STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Hoekstra, P.J., and Wilder and Zahra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DUANE JOSHUA HOUSTON,

Defendant-Appellant.
_____/

Supreme Court No. 126025

Court of Appeals No. 245889

Lower Court No. 02-9348FC

GENESEE COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Defendant-Appellant answers, "Yes".

II. **MUST DEFENDANT BE RESENTENCED WHEN THE COURT OF APPEALS HELD, AS A MATTER OF FIRST IMPRESSION, THAT THE LEGISLATURE INTENDED THE POSSIBLE IMPOSITION OF A LIFE SENTENCE UNDER HABITUAL OFFENDER GUIDELINES, EVEN THOUGH THE LANGUAGE OF THE APPLICABLE STATUTE DOES NOT AUTHORIZE A LIFE SENTENCE?**

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

In an October 2002 jury trial before Judge Robert Ranson in Genessee County Circuit Court, Defendant-Appellant Duane Houston was found guilty of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227(b), and not guilty of assault with intent to rob armed, MCL 750.89. He was sentenced as a second felony offender, MCL 769.10, to prison terms of life and two years.

The prosecution maintained at trial that on December 22, 2001, Mr. Houston shot John Strong in the head on a Flint street while trying to rob him. The defense said that Mr. Houston was at home when the shooting occurred.

At sentencing on November 13, 2002, there were numerous disputes over the correct scoring of the Michigan Sentencing Guidelines. The defense argued that offense variable 3 (OV 3), entitled "Physical Injury to a Victim," should be scored as zero rather than 25 points because the variable had no application to this second-degree murder case (40a). The prosecutor argued in response that since the Legislature specifically bars a score of 100 points under OV 3 where death occurs in the course of the sentencing offense, it must have intended that a score of *less* than 100 points could be imposed where death occurs in the course of the sentencing offense (41a). The court agreed with the prosecution that 25 points should be assessed for OV 3, and after the court made minor scoring changes not challenged on appeal, the parties agreed that the guidelines range was 162 to 337 months (42a-43a). Rather than accepting that, however, the court stated that it was apparent that mistakes had been made in scoring the guidelines, and it directed the probation agent to rescore the guidelines in their entirety (43a-44a).

After the rescoring, the guidelines range was increased to 180 to 375 months to life, with OV 3 remaining at 25 points (45a-46a). The defense again objected to the scoring of OV 3 (47a). The court imposed a sentence of life in prison for second-degree murder (48a).

Duane Houston appealed of right, and in an opinion of April 1, 2004, authored by Judge Jane Markey, *People v Houston,* 261 Mich App 463 (2004), the Court of Appeals affirmed the convictions and sentences (7a). The Court of Appeals held that OV 3 was misscored, but that the life sentence imposed is permissible under the corrected guidelines range of 162-337 months, even though that range does not explicitly authorize a life term. The court concluded that for every habitual offender sentence where the top of the guidelines range is 300 months or more than 300 months, the Legislature intended that a sentencing court have the option of imposing a life sentence (16a-18a).

Mr. Houston appealed to this Court, which issued an order on November 4, 2004, granting his Application for Leave to Appeal and limiting the appeal to two issues: 1) whether OV 3 was properly scored, and 2) whether a life sentence falls within the statutory sentencing guidelines for second-degree murder for a defendant who is an habitual offender (19a).

I. DEFENDANT MUST BE RESENTENCED WHEN, OVER DEFENSE OBJECTION, THE COURT IMPOSED A LIFE SENTENCE UNDER IMPROPERLY INFLATED GUIDELINES. OFENSE VARIABLE THREE DOES NOT PERMIT THE ASSESSMENT OF TWENTY-FIVE POINTS FOR INJURY IN A SECOND-DEGREE MURDER CASE.

STANDARD OF REVIEW AND ISSUE PRESERVATION

The abuse of discretion standard applies to the sentencing court's scoring of the Michigan Sentencing Guidelines as long as record evidence supports a particular score. *People v Hornsby,* 251 Mich App 462, 468 (2002). However, when the scoring is based on a statutory misinterpretation of a guidelines offense variable, this Court reviews the question *de novo. People v Webb,* 458 Mich 265, 274 (1998). The Court of Appeals applied the *de novo* standard in this case, citing *People v Hegwood,* 465 Mich 432, 436 (2001) (16a). The misscoring of OV 3 was preserved by timely objection. In its analysis, the Court of Appeals accepted that OV 3 was misscored, but concluded that the error did not require resentencing for reasons discussed in Issue II, i*nfra.*

A. THE LEGISLATIVE POLICY BEHIND THE OFFENSE VARIABLES IS TO PERMIT A SENTENCING COURT TO CONSIDER RELEVANT FACTORS THAT MAY NOT BE REFLECTED IN THE ELEMENTS OF THE OFFENSE.

The "apportionment of punishment," its "severity," "its efficacy or its futility," all are peculiarly questions of legislative policy." *Gore v United States,* 357 US 386, 393; 78 S Ct 1280; 2 L Ed 2d 1405 (1958).

Under Michigan legislative policy as embodied in MCL 769.31(e), "offense characteristics" of the Michigan Sentencing Guidelines are not limited to the elements of the crimes, but include any aggravating or mitigating factors that the sentencing commission deems appropriate. This is so because the fact of a particular crime – an armed robbery, a second-degree murder, etc. – is but one of several important considerations at a sentencing. Along with

the prior criminal history of the defendant, a major consideration is the seriousness of the particular crime, which is determined by the way that crime was committed and *how* the way it was committed affected others. Viewing a crime only in terms of its elements is insufficient "to capture the facts that intuition suggests should affect the sentence" in a particular case. Demleitner, Berman, Miller & Wright, *Sentencing Law and Policy* (New York: Aspen Press, 2004), p 223. The introduction of offense characteristics or variables in our state's guidelines sentencing scheme allows sentencing judges to "account for circumstances that the elements of the crime cannot cover." *Id. Accord, People v Babcock,* 469 Mich 247, 263-264 (2003) ["Offense variables take into account the severity of the criminal offense,"].

In Michigan, under authority of MCL 769.32 and MCL 769.33, a sentencing commission was charged with deciding what factors beyond the elements of the sentencing offense a sentencing judge may consider and how much importance these factors should be given. The intended result is a guidelines system where judges can sentence on the "real" criminal behavior and its effects, not limited by the elements of the conviction offense or offenses.

Legal scholars in the area of criminal sentencing have written at length on the idea that in every criminal conviction there is a "real offense" and the "offense of conviction," and that under an indeterminate sentencing system, whether or not that system includes guidelines, a judge can consider wrongdoing beyond that necessary to form the basis of the criminal conviction.[1] While some have suggested that the "real offense" approach is best illustrated by the Federal

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[1] The problem with such a system is that punishment may be based on factors proven outside traditional constitutional protections, including the protection provided by the requirement of proof beyond a reasonable doubt. It is this concern that led to the United State Supreme Court's recent decision in *Blakely v Washington,* 542 US ___ 124 S Ct 2531 159 L Ed 2d 403 (2004). The implications of *Blakely,* a decision this Court held inapplicable to the Michigan Sentencing Guidelines in *People v Claypool,* 470 Mich 715 (2004), are beyond the scope of this brief.

For a discussion of the "heated controversy" spawned by "real offense" sentencing, see Branham, *The Law of Sentencing, Corrections, and Prisoners' Rights* (St. Paul: West Publishing, 6th ed., 2002), pp 195-199.

Sentencing Guidelines, "which permit frequent and substantial sentence enhancements" based on uncharged "relevant conduct," Kittrie, Zenoff and Eng, *Sentencing, Sanctions and Corrections,* (NY: Foundation Press, 2nd ed., 2002), p 224, Michigan, too, follows the "real offense" approach to the extent that it allows a sentencing court to determine whether a case represents a particularly egregious or much less egregious example of the sentencing offense by considering factors that go beyond the bare elements of that offense.

Conduct that goes beyond the offense of conviction to the "real offense" may include an element or elements of an offense other than the offense for which the defendant is being sentenced and which arose out of the same transaction. MCL 769.31(d); *Sentencing Law and Policy, supra,* p 224. Michigan's OV 3, MCL 777.32, presents an example of this in its assessment of 100 points if a death results from the commission of a crime, and homicide is *not* the sentencing offense.

In their partially dissenting opinions in *People v Morson,* 471 Mich 248, 275 n3, 278 (2004), Justices Markman and Young stated that in looking at "offense characteristics" under MCL 769.31(d) a sentencing court can "consider not only the actual elements constituting the offense, but also any aggravating or mitigating factors *associated with* the offense..." (emphasis in original). Although the majority did not adopt Justices Markman's and Young's conclusion that only offenses resulting in convictions can be considered, *Id.* at 259, n10, this Court was unanimous in recognizing the central role of aggravating factors in the formulation of offense characteristics.

Although one cannot discern an entirely consistent theme among the Michigan offense variables, one can discern, *generally,* a legislative policy of not assessing points for factors that are inherent in the elements of the offense for which the defendant is being sentenced. For

example, under OV 1, MCL 777.31(2)(d), the Legislature disallows the scoring of five points where a weapon is displayed or implied in an armed robbery or felonious assault case. Under OV 8, MCL 777.38(2)(b), the Legislature disallows the scoring of any points for victim asportation or captivity if the sentencing offense is kidnapping. Under OV 11, MCL. 777.41(2)(c), the Legislature disallows the scoring of any points for criminal sexual penetration for a penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. Under OV 17, MCL 777.47(2), the Legislature disallows the scoring of points for negligence if points are scored for negligence under OV 6, MCL 777.36, which deals with intent to kill or injure.

The same Legislative concern reflected in the drafting of the above OV's is reflected in OV 3, physical injury to a victim. With the exception of the anomalous and later-added MCL 777.33(1)(b), involving alcohol-related deaths, this OV assesses points for aggravating circumstances, not for factors inherent in the sentencing offense itself. There is, for example, a large group of assault offenses for which OV 3 routinely is scored, none of which include physical injury to the victim as an element. OV 3 is the means our Legislature has created for enhancing a defendant's sentence when his or her assaultive conduct resulted in actual physical injury. This common aggravating circumstance permits a judge to sentence on the basis of the "real offense."

MCL 777.33 creates a clear division between behavior resulting in death and behavior resulting in injury. The language of the statute, coupled with the policy considerations behind the formulation of the offense variables generally, mandates the conclusion that the sentencing court in this case was without authority to assign 25 points for "injury to the victim" based on the Mr. Houston's conviction offense of second-degree murder.

B. OFFENSE VARIABLE THREE CREATES A GRADUATED SCALE FOR ASSESSING HARM TO THE VICTIM. WHEN THE HARM IS DEATH, THE STATUTE SAYS SO. WHEN THE HARM IS SOME DEGREE OF INJURY SHORT OF DEATH, THE STATUTE SAYS THAT AS WELL, IN PLAIN LANGUAGE.

The primary rule governing statutory interpretation is that, first and foremost, a court must ascertain and give effect to the intent of the legislature. *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374, 393 (1979). In giving effect to the intent of the Legislature, a court must apply the terms of a statute, giving the words used their common and ordinary meaning. To do otherwise is to invite judicial speculation about the unstated intent of the Legislature, resulting in the improper substitution of a court's policy preferences for those of the Legislature. *People v McIntire,* 461 Mich 147, 152-153 (1999). In designing our guidelines, it was the policy preference of the Michigan Legislature to authorize more severe sentences where aggravating factors, factors going beyond the elements of the sentencing offense, demonstrate that the "real offense" was particularly egregious.

While there is no published decision in this state construing whether the Legislature intended the assessment of 25 points under MCL 777.33 (1)(c) in a case where the victim was killed rather than injured and the accused was convicted of murder, both legislative policy considerations and the plain language of the statute establish that it did not. The instructions to OV 3 say that 100 points are to be assessed if death results and homicide is *not* the sentencing offense; 35 (now 50) points are to be assessed when death results and an element of sentencing offense involves "the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive under the influence or while impaired causing death." There are no instructions for the

assessment of 25 points under MCL 777.33(1)(c), beyond the statement that 25 points are to be assigned where "life threatening or permanent incapacitation injury occurred to a victim."

There are, however, unpublished opinions from the Court of Appeals construing the intent of the Legislature on this question, and Defendant Houston asks this Court to adopt as persuasive authority the majority of those opinions, as did the Court of Appeals in this case. In *People v Hauser,* Court of Appeals No. 239688, unpublished opinion of October 29, 2002, *lv den* 468 Mich 861(2003)(26a-28a), the defendant argued that the sentencing court had misapplied MCL 777.33(1)(c) when it assessed 25 points where there was a death and not just an injury. The Court of Appeals agreed, and began its analysis by stating the well-established rule that one must look to the specific language of a statute in determining legislative intent. In looking at the specific language of MCL 777.33, the court concluded that except for the sections of the OV that specify that the victim was killed or the victim was not injured, the OV is intended to apply where there is *some harm short of death:*

> The statute in effect offered the following scoring options for OV 3: (a) 100 points if a victim was killed, (b) 25 points if a victim sustained a life-threatening or permanent incapacitating injury, (c) 10 points if a victim sustained bodily injury requiring medical treatment, (d) 5 points if a victim sustained bodily injury not requiring medical treatment, or (e) 0 points if a victim was not injured. MCL 777.33(1). The statute reflects a graduated scale for assessing the harm to the victim. Given that death is assessed the highest number of points and no injury at all is assessed no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply *where there is some harm short of death.* Otherwise, a death for which points cannot be assessed under subsection 33(2)(b) could be assessed points under subsections 33(1)(b), (c), or (d) if the victim died after sustaining some injury. If that were the intent of the Legislature, it would not have limited the assessment of points for a victim's death to those crimes in which death of a person is not an element, but would have eliminated subsection 33(2)(b) altogether.
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> This interpretation is supported by the October 2000 amendment of the statute. The amendment provides for additional points for

> causing death while operating under the influence, which offense would otherwise not be assessed any points[2] .

(27a, emphasis added.)

Hauser has been followed in *People v Edelen,* Court of Appeals # 242167, unpublished opinion of December 23, 2003, and *People v Stanko,* Court of Appeals # 242876, unpublished opinion of January 27, 2003. However, in *People v Smith,* Court of Appeals # 234830, unpublished opinion of May 20, 2003, a panel of the Court of Appeals upheld a score of 25 points for OV 3 in a second-degree murder case. (See 29a-39a for copies of these cases.) The *Smith* panel engaged in no analysis, but simply concluded that because the victim was killed after the defendant "placed the victim under life threatening circumstances," the correct score under OV 3 was 25 points (36a).

In his opinion dissenting from the denial of leave to appeal in *People v Hauser, supra,* Justice Markman also concluded that 25 points was the correct score in a second-degree murder case because in *Hauser* there was a physical, life-threatening injury to the point that the injury resulted in death. However, our Legislature did not merge but, rather, carefully distinguished the words 'injury" and "death" when it drafted OV 3. It set out just two circumstances where points can be scored under this OV due to a homicide -- 100 points are assessed when a person is killed, but homicide is not the sentencing offense, MCL 777.33(1)(a), and 35 (now 50) points when a person is killed and the death results from an offense involving the operation of specified vehicles when the offender was under the influence of alcohol or a controlled substance, MCL 777.33(1)(b). Lesser points are assessed in descending order of seriousness for injury, as opposed to death, with 25 points for life threatening or permanent incapacitating

[2] The defendant in the *Hauser* case was in fact convicted of OUIL causing death. If the crime had occurred after the 2000 amendment of this statute, she would have been subject to assessment of 35 points under OV 3.

injury, 10 points for bodily injury requiring medical treatment and 5 points for bodily injury not requiring medical treatment, MCL 777.33(1)(c), (d) and (e). That the Legislature treats death as definitionally different from injury is plain on the face of MCL 777.33(2)(a), which states that in multiple offender cases "if 1 offender is assessed points for *death or physical injury,"* all offenders shall be assessed the same number of points." (Emphasis added.)

Statutory language is to be given its ordinary and generally accepted meaning. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135-136 (1996). In the statute at issue, our Legislature quite capably distinguished a killing from an injury. To read a "life threatening or permanent incapacitating injury" to mean a life *ending* injury, i.e. death, is to ignore the plain language of the statute. Other offense variables punish for second-degree murder. See, for example, OV 6, where Defendant Houston was assessed 25 points. [3] By its very language, OV 3 does not.

Further, an interpretation that authorizes 25 points for second-degree murder leads to an anomaly where second-degree murder requires 25 points while a somewhat less serious offense, like OUIL causing death, now requires 50 points. Minus a clear intent on the part of our Legislature to that effect, this Court should not endorse such a strange result. [4]

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[3] While OV 6, MCL 777.36, does assess points based on the intent element of the sentencing offense, this OV represents a special case in that there are different levels of malice, and it *is* relevant to a sentencing judge whether the defendant acted with an intent to kill, an intent to injure or with reckless disregard for the consequences of his or her behavior.

[4] In *People v Cathey,* 261 Mich App 506, 512-513 (2004), the Court of Appeals found that in drafting OV 3 the Legislature used certain language identical to the language of OV 2, "physical attack and/or injury," under the judicial sentencing guidelines. Cathey notes that in *People v Hegwood,* 465 Mich 432, 439 (2001), this Court stated that in creating its own guidelines the Legislature "opted for a system with many features that were easily recognizable by courts familiar with the format previously employed in Michigan." Thus it is noteworthy that the attack or injury variable of OV 2 was not applied to any homicide offenses under the judicial guidelines. (See Judicial Guidelines Sentencing Manual at pg 26.)

This does not mean that the Legislature chose to punish an injury more severely than a death. The opposite is true. The Legislature created a special class, M2, and a special grid, MCL 777.61, which apply only to second-degree murder cases, and through the special grid it chose to aggravate sentences for homicide far beyond sentences for other types of crimes against a person. In Mr. Houston's case, for example, if he had been assigned no points under OV 3, his OV score would have been lower than if he had been assessed 25 points for an injury that had not resulting in death. However, because of the special grid for second-degree murder cases, his guidelines range would have been much higher, even given the lower point total.[5]

That the Legislature chose the second-degree murder grid as its method of providing for increased sentences in second-degree murder cases is reflected in every cell of that grid. For example, while the lowest possible range for Class A offenses (crimes against a person scored at A I) is 21-35 months, the lowest possible range under the second-degree murder 90-150 months. For Class A offenses, a person with zero points under the prior record variables, but 100 points or more under the offense variables (an A VI) is subject to a range of 108-180 months, while a person with the same number of points under the second-degree murder grid (an A III) is subject to a range of 162-270 or life. See MCL 777.61, MCL 777.62.

Because the duty of the judiciary is to interpret, not make, laws, giving effect to the intent of the Legislature; because this law is clearly written, using plain and ordinary words; and

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[5] For, example, if Mr. Huston's guidelines scores remained the same, except for the deletion of 25 points for OV 3, he would be a B II under the second-degree murder grid, and his habitual offender guidelines range would be 162-337 months. If there had been an incapacitating or life-threatening injury, but no death, and he had gotten all the same points, plus an addition 25 points under OV 3, he would be a B VI under the sentencing grid for Class A Offenses, and his habitual offender guidelines range would be much lower, 108-225 months.

because correction of this scoring error would result in a guidelines range below the minimum sentence imposed, Duane Houston asks this Court to remand his case for resentencing.

II. DEFENDANT MUST BE RESENTENCED WHEN THE COURT OF APPEALS HELD, AS A MATTER OF FIRST IMPRESSION, THAT THE LEGISLATURE INTENDED THE POSSIBLE IMPOSITION OF A LIFE SENTENCE UNDER HABITUAL OFFENDER GUIDELINES, EVEN THOUGH THE LANGUAGE OF THE APPLICABLE STATUTE DOES NOT AUTHORIZE A LIFE SENTENCE.

STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews *de novo* questions involving the proper construction or application of statutory sentencing guidelines. *People v Hegwood,* 465 Mich 432, 436 (2001). Although defense counsel objected to the scoring of the guidelines, he did not object that the habitual offender guidelines were being misconstrued to permit the imposition of a life sentence. Interpretation of the habitual offender guidelines was not at issue in the sentencing court. The judge thought he was sentencing within the guidelines when he imposed life because, with the erroneous assessment of 25 points for OV 3, the guidelines range was 180-375 to life. The issue before this Court today was neither briefed nor discussed by the parties in the Court of Appeals. It was only when the Court of Appeals issued its published opinion in this case that it announced its holding, as a matter of first impression, that the Legislature intended the possibility of a life sentence for every habitual offender sentence where the top of the guidelines range is 300 months or longer. For purposes of consideration by this Court, the issue was preserved by the Court of Appeals in its act of "reaching out" to address the issue.

A. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT, FOR ANY HABITUAL OFFENDER SENTENCE WHERE THE TOP OF THE GUIDELINES RANGE IS 300 MONTHS OR MORE, THE LEGISLATURE INTENDED THE POSSIBLE IMPOSITION OF A LIFE SENTENCE.

Defendant Houston summarizes the analysis of the Court of Appeals as follows: The correctly scored guidelines range of 162-337 months encompasses a possible life sentence even though a possible life sentence is not indicated in the guidelines range as published in the *Michigan Sentencing Guideline Manual*. The manual does not reflect the sentencing law of this state, but MCL 777.21(3) does, as to habitual offenders, and that statute contains no actual sentencing grids. Rather, it merely directs that the upper level of the recommended range for an indeterminate sentence be increased in proportion to whether the offender has one (25%), two (50%) or three or more (100%) prior felony or attempted felony convictions. For non-habitual offender sentences under MCL 777.61, *et al,* whenever the top of the range is 300 months or more, an alternate sentence of life is also specified. For any habitual offender sentence where the top of the range is 300 months or more, the Legislature intended that a life sentence be included within the permissible range. (See 16a-18a.)

B. THE COURT OF APPEALS WAS WITHOUT AUTHORITY TO DETERMINE LEGISLATIVE INTENT FROM LEGISLATIVE SILENCE OR TO USE LEGISLATIVE SILENCE TO CORRECT WHAT IT MAY HAVE VIEWED AS AN ABSURD RESULT.

"A criminal statute is to be construed according to its language and not beyond it." *People v Johnson,* 104 Mich App 629, 633 (1981). "Only when statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent." *People v Phillips,* 469 Mich 390, 394-395 (2003). When a statute is unambiguous, judicial construction is not permitted because the Legislature "is presumed to have intended the meaning it plainly expressed." *People v Weeder,* 469 Mich 493, 497 (2004). When the words of a statute are unambiguous, this Court gives those words their plain meaning, and applies the statute just as it is written. *People v Morson,* 471 Mich 248, 255 (2004). "Michigan courts determine the

Legislature's intent from its words, not from its silence." *People v Hawkins,* 468 Mich 488, 507 (2003), quoting *Donaikowski v Alpena Power Company,* 460 Mich 243, 261 (1999).

In this case, the Court of Appeals tried to determine the Legislature's intent from its silence. The court never claimed that MCL 777.21(3) was ambiguous. Nonetheless, the court reached out in a case where the precise issue was never raised to "construe" the "silences" in an unambiguous statute, contrary to the above-cited cases from this Court.

MCL 777.21(3) states: "To determine the recommended minimum sentence range [for an habitual offender], increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense as follows: (a) If the offender is being sentenced for a second felony, 25%. (b) If the offender is being sentenced for a third felony, 50%. (c) If the offender is being sentence for a fourth or subsequent felony, 100%." "Part 6" refers to the section of the statute entitled, "Sentencing Grids." There is nothing in this plain language to suggest that the Legislature intended judges to divine that 300 months or more implicitly includes "or life."[6]

Indeed, in MCL 777.61 and 777.62, where the Legislature set out the sentencing ranges for second-degree murder and Class A offenses, the Legislature did specify the ranges where life is a permissible option by stating, for example, "365-600 months or life," "270-450 months or life," etc. Further, every cell or loci where a life sentence is permitted does not have an upper number of 300 months or some higher number. In the second-degree murder grid, someone in the A III category may be sentenced to a minimum between 162-270 months or to life.

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[6] Interestingly, in *People v Greaux,* 461 Mich 339, 344 (2000), this Court reversed the judgment of the Court of Appeals that a life sentence was within the judicial sentencing guidelines for every armed robbery and assault with intent to murder because the statutes for those crimes specify that life is the statutory maximum. Reinforcing Defendant Houston's position that guidelines ranges must be followed as written, this Court said that life could be imposed for those offenses only where the grid cells contained the words "or life."

Thus for non-habitual offender sentences under the grids contained in MCL 777.61 through MCL 777.69, the Legislature wrote the words "or life" in every cell or loci where a life sentence was a permissible alternative to a term of years. Certainly if the Legislature had intended an alternative sentence of life in every habitual offender case where the top of the range is at least 300 months, it could and would have written that, just as it did in the statutes covering the grids for non-habituals. Instead, the Legislature chose to include a life sentence as a guidelines-approved option only where the scores fall within certain cells, whether or not the offender is a prior felon. That is a rational choice, one the Legislature, not the courts, is empowered to make.

While the Court of Appeals is, of course, correct that the *Michigan Sentencing Guidelines Manual* does not have the force of law, the drafters of that manual did *follow* the law, and its grids reflect precisely the language of the applicable statutes. Unlike the Court of Appeals, the drafters of the manual did not try to infer from statutory silence what the Legislature "could have" or "should have" included, but in fact did *not* include.

The Court of Appeals appears to have concluded that disallowing a life sentence for second-degree murder under the habitual offender guidelines is illogical, perhaps even absurd. Instructive is *People v Javens,* 469 Mich 1025, 1026 (2004), where this Court reversed an order of the circuit court disallowing bail on the charge of solicitation to murder. By court rule and statute, solicitation to murder is not an offense for which bail can be denied. In a concurrence, Justice Young noted that the case showed why the "absurd results" doctrine may in fact be a "proxy for an alternative and unspoken judicial policy preference":

> This is the temptation of the "absurd results" doctrine: it allows a court to engage in "'judicial lawmaking'" while purporting to track an imagined legislative intent. (Citation omitted.) The doctrine itself is "a form of judicial usurpation that runs counter to the bedrock

> principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives." (Citation omitted.) Invocation of the "absurd results" doctrine is therefore often little more than a signal that a court proposes to create the law anew – thereby exceeding the scope of its authority to claim that which has been constitutionally delegated to the Legislature.

In a similar vein, Chief Justice Corrigan noted in her concurring opinion in *People v Morson, supra* at 269, that even where there is conflicting language in guidelines legislation, judges may not correct that language because "it is the duty of the judiciary to interpret, not to write, our laws."

The Court of Appeals in Mr. Huston's case went one step beyond trying to correct language to trying to insert language where no language exists. Because this opinion represents an instance of judicial lawmaking disguised as judicial "construction," Duane Houston asks this Court to remand to the trial court for resentencing under the habitual offender guidelines as they are written.

SUMMARY AND RELIEF

Defendant-Appellant DUANE JOSHA HOUSTON asks this Court to remand his case to the trial court for a resentencing.

Respectfully submitted,

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